No. 01-904

In the Supreme Court of the United States

ANTONIO ALANIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), in sentencing petitioner to 468 months' imprisonment for drug trafficking offenses, when the quantity of drugs involved in those offenses was not proved to the jury beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 265 F.3d 576.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2001. The petition for a writ of certiorari was filed on December 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner

was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); two counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 4 and 5); one count of possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2); and two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) (Counts 6 and 7). He was sentenced to 468 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. In June 1998, petitioner offered Stephen Moore money to help him unload a shipment of marijuana, and Moore agreed. Petitioner asked Moore to find a location to store the marijuana, and Moore suggested the property of his friend Raymond Selke. Petitioner, Moore, and Selke unloaded a shipment of approximately 81 kilograms of marijuana on Selke's property. Pet. App. 2a; Gov't C.A. Br. 5-6.

Subsequently, petitioner, Moore, and Selke agreed to procure and distribute large quantities of cocaine. Petitioner instructed Selke to purchase a truck and gave him the money to do so. In the spring of 1999, Selke, at petitioner's behest, asked Raymond Henckel to drive the truck from Indiana to Texas. On July 5, 1999, petitioner, Moore, and Selke flew to Texas, where they picked up the truck, which had been stocked with cocaine in hidden compartments inside the fuel tanks. Selke and Moore drove the truck back to Indiana, while petitioner returned by air. Upon their arrival in Indiana, the three men unloaded approximately 300 kilogram-size packages of cocaine. Pet. App. 2a-3a; Gov't C.A. Br. 6-7.

Over the next few months, petitioner, Selke, and Moore transported six additional loads of cocaine from

Texas to Indiana. The loads ranged in size from 422 kilograms to 800 kilograms. Pet. App. 3a; Gov't C.A. Br. 7-9.

On November 4, 1999, after the three men had unloaded a 422-kilogram shipment of cocaine at Selke's property, law-enforcement officers, who had been watching the property, approached Selke and seized the cocaine. Selke, and later Moore, cooperated with the authorities. Pet. App. 3a-4a; Gov't C.A. Br. 3-5.

On January 27, 2000, petitioner was arrested. During a search of his residence, law-enforcement officers found a 9 millimeter semi-automatic handgun in a nightstand in the master bedroom and a .22 caliber rifle in a cabinet in the basement. See Pet. App. 5a; Gov't C.A. Br. 10.

2. Petitioner was charged in a seven-count superseding indictment with drug and firearms offenses. Count 1 charged petitioner with conspiring to possess "an amount in excess of five (5) kilograms" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. Count 2 charged petitioner with possessing an unspecified quantity of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Counts 3 and 4 charged petitioner with possessing "in excess of five (5) kilograms" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Count 5 charged petitioner with possessing "in excess of five (5) kilograms (approximately 422 kilograms)" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Counts 6 and 7 charged that petitioner, a previously convicted felon, unlawfully possessed firearms, in violation of 18 U.S.C. 922(g). The district court dismissed Count 3 before trial.

At trial, petitioner's defense strategy focused on his claimed innocence of the crimes. Pet. App. 21a. Peti-

tioner did not request that the jury be instructed to find drug quantity beyond a reasonable doubt, and the district court did not give such an instruction. The jury found petitioner guilty of the six remaining counts. *Id.* at 29a.

3. The Probation Office prepared petitioner's Presentence Report (PSR). The PSR determined that petitioner's offenses involved between 3622 and 3922 kilograms of cocaine, an amount that included the seven Texas-to-Indiana cocaine shipments. PSR para. 29. Petitioner disputed the quantity of drugs attributed to him on the ground that "the amounts and dates come exclusively from the confidential informants or cooperating witnesses, Mr. Selke and Mr. Moore." Objections to PSR para. 16.

At sentencing, petitioner contended he was responsible for 432 kilograms of cocaine, rather than the larger quantities attributed to him in the PSR. See 8/4/00 Sentencing Tr. 9. The district court concluded that the government had proved "by more than a preponderance of the evidence" that petitioner was responsible for 3302 kilograms of cocaine. *Id.* at 23-27. The court converted that quantity to marijuana to account for the 81.648 kilograms of marijuana involved in Count 2. On that basis, the court determined that petitioner was responsible for 660,481.648 kilograms of marijuana, an amount that triggered a base offense level of 38 under the Sentencing Guidelines. *Id.* at 28. The court added a two-level increase in petitioner's offense level because he was a leader of the conspiracy. With a total offense level of 40 and a criminal history category of III, petitioner was subject to a Guidelines sentencing range of 360 months' to life imprisonment. *Id.* at 34. The court imposed concurrent sentences of 468 months' imprisonment on the cocaine counts, 240 months'

imprisonment on the marijuana count, and 120 months' imprisonment on the firearms counts. *Id.* at 80. The court also imposed a five-year term of supervised release. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-28a.

The court of appeals rejected petitioner's contention that his sentences for the drug offenses should be reversed under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because those sentences were based on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt. The court of appeals held that, because petitioner had not raised any *Apprendi*-type claim in the district court, the claim was subject to review under the plain-error standard. Pet. App. 19a; see Fed. R. Crim. P. 52(b).

On the three cocaine counts, the court of appeals found no *Apprendi* error with respect to the indictment, which alleged that each of those counts involved "in excess of five (5) kilograms" of cocaine. The court held that the failure to submit the question of threshold drug quantity to the jury was error under *Apprendi*. The court concluded, however, that the error did not affect petitioner's "substantial rights," because the evidence of threshold drug quantity was overwhelming and essentially uncontroverted. Pet. App. 17a-22a.

On the marijuana count, the court of appeals found *Apprendi* error in the failure to allege drug quantity in the indictment and to submit the question of threshold drug quantity to the jury. Again, however, the court concluded that the error did not affect petitioner's substantial rights, because his 240-month sentence on the marijuana count was to run concurrently with his 468-month sentences on the cocaine counts. Pet. App. 22a.

ARGUMENT

Petitioner contends (Pet. 5-13) that his 468-month sentences on the cocaine-trafficking counts and his 240-month sentence on the marijuana-trafficking count should be vacated in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because those sentences exceed the otherwise-applicable statutory maximum based on a fact, drug quantity, that was not found by the jury beyond a reasonable doubt. Petitioner raised his *Apprendi* claim for the first time on appeal. The court of appeals, applying the plain-error standard, rejected the claim. That conclusion is correct and does not warrant this Court's review.

1. In *Apprendi*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. As the court of appeals recognized, the district court erred under *Apprendi* in sentencing petitioner to 468 months' imprisonment on the three cocaine counts and 240 months' imprisonment on the marijuana count, because those sentences depend upon a fact, drug quantity, that was not found by the jury beyond a reasonable doubt. In the absence of such a jury finding, petitioner was subject to statutory maximum sentences of 240 months' imprisonment on the cocaine counts, see 21 U.S.C. 841(b)(1)(C), and 60 months' imprisonment on the marijuana count, see 21 U.S.C. 841(b)(1)(D).

Because petitioner did not raise any *Apprendi*-type challenge to his sentence in the district court, however, the court of appeals correctly reviewed that challenge under the plain-error standard. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467

(1997) (in order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Petitioner suggests (Pet. 9-10, 12) that 18 U.S.C. 3742(f)(1) precludes a court of appeals from applying a plain-error standard of review to a sentencing error. That argument, which was not advanced below, lacks support in the text of Section 3742(f)(1) and the case law. In providing that a remand shall occur if a sentence "was imposed in violation of law," Section 3742(f)(1) does not preclude harmless-error or plain-error review under Rule 52 of the Federal Rules of Criminal Procedure. Section 3742(f)(1) and Rule 52 can, and should, be read together to require a remand only when a sentencing error has prejudiced the defendant. No court has read Section 3742(f)(1) to prohibit harmless-error and plain-error review of sentencing errors. Indeed, the D.C. Circuit has specifically rejected such a claim, noting that "the plain-error doctrine was well entrenched as a background legal principle when Congress acted, and we think it fanciful to suppose that Congress intended § 3742(f)(1) to override that doctrine." *United States* v. *Saro*, 24 F.3d 283, 286 (D.C. Cir. 1994), cert. denied, 519 U.S. 956 (1996); cf. *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999) ("The statute [the Federal Death Penalty Act] does not explicitly announce an exception to plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme.").

2. Under the plain-error standard, the district court's error in imposing sentences above the otherwise-applicable statutory maximum, while "plain" in

light of *Apprendi*, did not affect petitioner's substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings. That is so for two independently sufficient reasons.

First, the evidence was overwhelming and essentially uncontroverted that each of petitioner's offenses involved a sufficient quantity of drugs to trigger a statutory maximum sentence in excess of the sentence actually imposed.

With respect to the cocaine counts, in order to authorize a maximum sentence of life imprisonment, an offense must involve at least 5 kilograms of cocaine. 21 U.S.C. 841(b)(1)(A)(ii). And, in order to authorize a maximum sentence of 40 years' imprisonment, an offense must involve at least 500 grams of cocaine. 21 U.S.C. 841(b)(1)(B)(ii). The court of appeals concluded that "there was overwhelming evidence that more than five kilograms were involved in the conspiracy," observing that, even if only the load seized in November 1999 was considered, the conspiracy would involve 422 kilograms of cocaine. Pet. App. 20a. The court also found essentially uncontroverted evidence that the two substantive cocaine offenses each involved more than 5 kilograms of cocaine. *Id.* at 21a (noting evidence that one count involved 422 kilograms and the other count involved 135 kilograms). Indeed, petitioner conceded at sentencing that his offenses involved 432 kilograms of cocaine. 8/4/00 Sentencing Tr. 7-9.

With respect to the marijuana count, in order to authorize a sentence of up to 240 months' imprisonment, an offense must involve at least 50 kilograms of marijuana. 21 U.S.C. 841(b)(1)(D). Here, the trial testimony of petitioners' two associates, Stephen Moore and Raymond Selke, established that petitioner possessed approximately 81 kilograms of marijuana. Pet. App.

23a. In any event, the court of appeals observed that, because petitioner's 240-month sentence on the marijuana count is to run concurrently with his 468-month sentences on the cocaine counts, any *Apprendi* error with respect to the marijuana count "had no effect on [petitioner's] sentence and thus did not prejudice him." *Id.* at 22a.[1]

In these circumstances, the district court's *Apprendi* error could not have "affected substantial rights" or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (no relief from plain error where element of offense that was not submitted to jury was "essentially uncontroverted" and the evidence supporting it was "overwhelming"); see, *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved the enhancing quantity of drugs.), cert. denied, 122 S. Ct. 79 (2001); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United*

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[1] In the superseding indictment, the marijuana count, unlike the three cocaine counts, did not allege a threshold drug quantity. On January 4, 2002, this Court granted certiorari in *United States* v. *Cotton*, No. 01-687 (to be argued Apr. 15, 2002), to consider the appropriate analysis of *Apprendi* challenges, raised for the first time on appeal, to sentences that exceed the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. Petitioner does not request that the petition in this case be held for disposition in light of *Cotton*. Nor is there any valid reason to do so. As the court of appeals recognized, even if the marijuana count were disregarded, petitioner would be subject to the same total term of imprisonment.

States v. *Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000), cert. denied, 533 U.S. 953 (2001).[2]

Second, petitioner was convicted of multiple drug and firearms offenses. His sentences for those offenses could (and should, if necessary, under the Sentencing Guidelines) run consecutively, in part, to produce the same total sentences that he actually received.

Under Section 5G1.2(d) of the Sentencing Guidelines, if no count of conviction is sufficient by itself to authorize imposition of the full term of imprisonment prescribed by the Guidelines, the district court is required to run the terms of imprisonment imposed on separate counts consecutively to the extent necessary to achieve the appropriate Guidelines sentence.[3] See 18 U.S.C. 3584 (permitting imposition of consecutive sentences). Consequently, when a defendant has been

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[2] Contrary to petitioner's assertions (Pet. 11), this Court's decision in *Glover* v. *United States*, 531 U.S. 198 (2001), does not advance his position that the *Apprendi* error in this case affected his substantial rights. In *Glover*, the Court held that any increase in a defendant's "amount of actual jail time" that results from his counsel's constitutionally deficient performance is sufficient to satisfy the prejudice requirement in a claim of ineffective assistance of counsel. 531 U.S. at 208. An *Apprendi* error does not, however, result in any increase in the "amount of actual jail time" where, as here, the defendant would have received the same sentence if he had been accorded the procedural protections required by *Apprendi*.

[3] Section 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

convicted of multiple offenses, most circuits have affirmed sentences imposed in violation of *Apprendi* if the permissible maximum sentences for those offenses, run consecutively, would equal or exceed the defendant's actual total sentence. See, *e.g.*, *United States* v. *Angle*, 254 F.3d 514, 518-519 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 309 (2001); *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir.), cert. denied, 121 S. Ct. 1309 (2001); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir.), cert. denied, 122 S. Ct. 182 (2001); *United States* v. *Price*, 265 F.3d 1097, 1108-1109 (10th Cir. 2001) (collecting cases), petition for cert. pending, No. 01-8242 (filed Jan. 30, 2002).

There is no conflict on this issue that warrants the Court's review at this time. Two circuits have taken a different approach to whether Section 5G1.2(d) of the Sentencing Guidelines can support affirmance of a sentence despite an *Apprendi* error. See *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001) (holding that district court has discretion whether to run sentences consecutively or concurrently and remanding for district court to exercise its discretion); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001) (per curiam) (similar). But the Eighth Circuit has granted rehearing en banc to consider the issue, see *United States* v. *Diaz*, 270 F.3d 741 (2001) (granting rehearing en banc in relevant part of decision reported as *United States* v. *Sherman*, 262 F.3d 784 (2001)), and the government has asked the Fifth Circuit to reconsider en banc the position taken in *Vasquez-Zamora* that stacking is discretionary, see Gov't Pet. for Reh'g, *United States* v. *Randle*, 259 F.3d 319 (2001). Moreover, even if a clear circuit conflict existed, disputes with respect to Guidelines interpretation may appropriately be left for resolution by the Sentencing

Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

Here, petitioner was convicted of six offenses. The three cocaine counts each carried a statutory maximum sentence of 240 months' imprisonment without regard to drug quantity, see 21 U.S.C. 841(b)(1)(C); the marijuana count carried a statutory maximum sentence of 60 months' imprisonment without regard to drug quantity, see 21 U.S.C. 841(b)(1)(D); and the two firearms counts each carried a statutory maximum sentence of 120 months' imprisonment, see 18 U.S.C. 924(a)(2). Petitioner was subject to a total sentence of 360 months' to life imprisonment under the Sentencing Guidelines, and the district court imposed a sentence of 468 months' imprisonment. Under Section 5G1.2(d), if petitioner's sentence of 468 months' imprisonment could not be imposed on a single count (*e.g.*, because drug quantity was not submitted to the jury), the district court would be required to run the sentences on the separate counts consecutively, in part, to produce the same total sentence.

3. Petitioner contends that "at least eight other circuits" would have vacated his sentence and remanded for re-sentencing under the circumstances of this case. Pet. 12-13 (citing decisions of the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits). There is no conflict, however, that warrants this Court's review. Petitioner clearly would not prevail in six of those eight circuits, and, as noted above, the en banc process in the Fifth and Eighth Circuits may eliminate any conflict as applied to cases involving *Apprendi* errors in which sentences on multiple counts could be run consecutively under Section 5G1.2.

In a case involving *Apprendi* error and multiple counts of conviction, the Second Circuit has held that,

when consecutive sentencing under Section 5G1.2 would produce the same sentence, the error does not affect substantial rights, and relief under the plain-error rule is not warranted. *United States* v. *McLean*, No. 00-1342, 2002 WL 483474, at *7 (2d Cir. Mar. 28, 2002). The Fourth Circuit overruled the decision cited by petitioner and held that relief is not warranted when consecutive sentencing under Section 5G1.2 would produce the same sentence. *United States* v. *Angle*, 254 F.3d at 518-519. The Sixth Circuit has reached the same conclusion. *United States* v. *Page*, 232 F.3d 536, 544-545 (2000), cert. denied, 532 U.S. 935, 1023, and 1056 (2001). The Ninth Circuit has held that both overwhelming evidence and consecutive sentencing under Section 5G1.2 can justify the denial of relief for *Apprendi* error on plain-error review. *United States* v. *Buckland*, 277 F.3d 1173, 1183-1186 (2002) (en banc). The Tenth Circuit has held that, when sentences can be run consecutively under Section 5G1.2 to produce the same sentence that was actually imposed, no relief is warranted. *Price*, 265 F.3d at 1108-1109. And the D.C. Circuit has held that *Apprendi* error does not warrant relief on plain-error review when there is overwhelming evidence of the fact that the jury did not decide, in violation of *Apprendi*. *United States* v. *Webb*, 255 F.3d 890, 902 (2001).

In light of those decisions, and the continuing developments in the Fifth and Eighth Circuits, review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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